Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FLANDREAU SANTEE SIOUX TRIBE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL M. BILLION *
MYERS, PETERS, HOFFMAN & BILLION
300 N. DAKOTA AVENUE
#510
SIOUX FALLS, SD 57104
(605) 336-3700

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

Whether an Indian Tribal Government is a person subject to penalty by 26 U.S.C §6675.

PARTIES TO THE PROCEEDINGS

Petitioner

Flandreau Santee Sioux Tribe is a tribe of American Native Indians and has no corporate affiliations.

Respondent

The United States of America.

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- *Flandreau Santee Sioux Tribe v. United States of America*, Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Eighth Circuit, No. 99-1670 SDSF (February 9, 2000) (no official citation).

- *Flandreau Santee Sioux Tribe v. United States of America*, Opinion Reversing Judgment of District Court, United States Court of Appeals for the Eighth Circuit, No. 99-1670 (November 29, 1999). 197 F.3d 949 (8th Cir.).

- *Flandreau Santee Sioux Tribe v. United States of America*, Memorandum Opinion and Order, United States District Court for the District of South Dakota, CIV. 97-4116 (October 2, 1998) (no official citation.)

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Eighth Circuit for which Petitioner seeks review was entered on November 29, 1999. The Order Denying Petition for Rehearing and for Rehearing En Banc was entered on February 9, 2000. This Court has jurisdiction to review on

writ of certiorari the judgment of the Court of Appeals in this matter pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

26 U.S.C. §4081
26 U.S.C. §4221
26 U.S.C. §6421(c)
26 U.S.C. §6421(d)
26 U.S.C. §6421(g)
26 U.S.C. §6421(j)
26 U.S.C. §6675
26 U.S.C. §7701(a)
26 U.S.C. §7701(a)(2)
26 U.S.C. §7701(a)(3)
26 U.S.C. §7701(a)(10)
26 U.S.C. §7701(a)(40)
26 U.S.C. §7871(a)(2)

STATEMENT OF THE CASE

The Flandreau Santee Sioux Tribe operates a convenience store which is located on tribal land near the city limits of Flandreau, South Dakota. The convenience store is open to the general public and sells gasoline in addition to other convenience store items. On or about August 23, 1991, the Tribal Government, acting on behalf of the Tribe, filed an administrative claim for refund of federal excise taxes for gasoline purchased from its supplier for the four quarters of 1988 as authorized by 26 U.S.C. §7871(a)(2)(B). The Tribe received a refund for the total federal excise taxes paid for 1988. On audit, the Internal Revenue Service determined that the refund was erroneous because the gasoline was sold to the public and not used for essential Government functions. The Internal Revenue Service assessed for the gasoline excise tax refund, interest and a penalty under 26 U.S.C. §6675. The Tribe paid the gasoline excise tax with interest, but disputed the penalty. Following an unsuccessful administrative appeal, the tribe paid the total penalty and after its administrative refund claim was denied, commenced this federal tax refund suit.

Prior to and continuing through all of 1988, the Flandreau Santee Sioux Tribe possessed the status of a federally recognized tribe organized pursuant to the Indian Reorganization Act, 25 U.S.C. §§461-479. It is undisputed that the Tribe is an "Indian Tribal Government" as defined in 26 U.S.C. §7701(a)(40).

ARGUMENT

The Eighth Circuit's decision reversing the District Court in this case is in conflict with existing case precedent

from the United State Supreme Court. This is a case of first impression in which the Eighth Circuit decision failed to recognize the established precedent that ambiguous statutory provisions are resolved in favor of the Indians. The issue in this case is an important question of federal law that must be decided by the United States Supreme Court.

ISSUE 1: WHETHER AN INDIAN TRIBAL GOVERNMENT IS A PERSON SUBJECT TO PENALTY BY 26 U.S.C. §6675.

Title 26 defines all instances in which taxes will be imposed. Revenue Ruling 67-284, 1967-2 C.B. 55, 58 holds that Indian tribes are not taxable entities. They are not individuals, trusts, estates, or corporations. For purposes of Title 26, "Indian tribal government" is defined as "the governing body of any tribe, band, community, village or group of Indians . . . which is determined by the Secretary after consultation with the Secretary of the Interior to exercise governmental functions." 26 U.S.C. §7701(a) (40). For purposes of Title 26, "corporation" is defined to include associations, joint stock companies and insurance companies. 26 U.S.C. §7701(a)(3).

The Indian Tribal Government Tax Status Act of 1982 [Title 2, Public Law 97-473], which grants an exemption from excise taxes for fuel used in the essential government functions of an Indian tribal government, provides that the tax treatment of Indian tribes as specified in Revenue Ruling 67-284 has not changed and reaffirms that Indian tribes are not taxable entities. Senate Report 97-646, p.12. Public Law 97-473 defined Indian tribal government and granted Indian tribal governments the status of states for certain purposes including exemption from or refunds with regard to excise taxes. 26 U.S.C §7871. Public Law 97-473 did not modify 26 U.S.C.

§6675 to include Indian tribal governments. At the time of the enactment of the Indian Tribal Government Tax Status Act, 26 U.S.C. §4221(a) provided that a manufacturer's sale on which excise taxes would otherwise be imposed (including gasoline) was exempted if the sale is to state or local government for its exclusive use. At that time, 26 U.S.C. §6675 provided:

> In addition to any criminal penalty provided by law if a claim is made under Sec. 6420 (relating to gasoline used on farms), 6421 (relating to gasoline used for certain non-highway purposes or by local transit systems), or 6427 (relating to fuels not used for taxable purposes), for an excessive amount, unless it is shown that the claim for such excessive amount is due to reasonable cause, the person making such claim shall be liable to a penalty in an amount equal to whichever of the following is greater:
>
> (1) two times the excessive amount; or
> (2) $10.00.

The penalty statute refers to "the person" making the claim for refund; the Tribe is not a person as defined in 26 U.S.C. §7701(a)(1). That statute provides in pertinent part:

> (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--
> (1) Person.--The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

> (2) Partnership and partner.--The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.
> (3) Corporation.--The term "corporation" includes associations, joint-stock companies, and insurance companies.

The term "person" does not include the sovereign, and statutes employing the phrase are ordinarily construed to exclude the sovereign. *United States of America v. Cooper Corporation,* 312 U.S. 600, 604 (1941). *See, Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979); *Chemehuevi Indian Tribe v. California Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985). The Tribe is not a mere group or unit comprised of individuals. It has a specific legal identity as a governmental entity, is a domestic nation, and is a distinct political community that exercises powers of independence and self-government. *Id.* A definitional statute which declares what a term "means" excludes any meaning that is not stated, *National Wildlife Fed. v. Gorsuch*, 693 F.2d 156, 172 (D.C. 1982), while a definitional statute that uses the word "includes" denotes enlargement, not limitation. *Exxon Corp. v. Lujan*, 730 F.Supp. 1535, 1545 (D.Wyo. 1990), *aff'd*, 970 F.2d 757 (10th Cir. 1992). Section 7701 states that "'person' shall be construed to mean and include . . ." a phrase which is ambiguous because it uses both restrictive and

expansive terms. Because ambiguous statutory provisions are resolved in favor of the Indians, *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 965, 127 L.Ed.2d 252 (1994), because tax statutes imposing penalties are strictly construed, *Commissioner v. Acker*, 361 U.S. 87, 91 (1959), and because tax statutes are construed liberally against the government and in favor of the taxpayer, *Gould v. Gould*, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211 (1917); *Security Bank Minnesota v. Commissioner of Internal Revenue*, 994 F.2d 432, 441 (8th Cir. 1993), the penalty statute does not apply to the Tribe.

Although there is no explicit definition of the term "person" in 26 U.S.C. §6675, the statutory scheme demonstrates Congressional intent that the term does not include a Native American tribe. 26 U.S.C. §6675 was enacted along with 26 U.S.C. §6420 by Act of April 2, 1956, C. 160, 70 Stat. 87. It provided:

> (a) Civil Penalty. In additional to any criminal penalty provided by law, if a claim is made under section 6420 (relating to gasoline used on farms) for an excessive amount, unless it is shown that the claim for such excessive amount is due to reasonable cause, the person making such claim shall be liable to a penalty is an amount equal to whichever of the following is greater:
>
> (1) Two times the excessive amount; or
>
> (2) $10.
>
> (b) For purposes of this section, the term "excessive amount" means in the case of any person the amount by which
>
> (1) the amount claimed under section 6420 for any period, exceeds

(2) the amount allowable under such section for such period.

The Highway Revenue Act of 1956[1] added 26 U.S.C. §6421 to provide a refund relating to gasoline used for non-highway purposes and amended 26 U.S.C. §6675 to refer to claims made pursuant to 26 U.S.C. §6421 in addition to 26 U.S.C. §6420. Section 6421 provided that in the case of gasoline used as a fuel in a highway vehicle owned by the United States, the Secretary of the Treasury shall refund one cent per gallon to the ultimate purchaser. Thus, if §§6421 and 6675 are to be read in *pari materia*, to determine a common definition of "person", the United States as a potential claimant pursuant to 26 U.S.C. §6421, became potentially liable for an obligatory penalty for an excessive claim given the mandatory language of §6675 stating that the person making the claim shall be liable for a penalty. It is thus evident that under 26 U.S.C. §§6420, 6421 and 6427 there are two classes of potential claimants. This is further demonstrated by the fact that 26 U.S.C. §6421(d) requires that the person filing a claim for refund do so before the time prescribed by law for filing a claim for an overpayment of its income taxes for its taxable year under Subtitle A.[2] An Indian Tribe is not income taxable. Revenue Ruling 67-284, 1967-2 C.B. 55, 58. When read in *pari materia*, person denotes a claimant subject to income taxes and as Indian Tribes are not income taxable, they are not subject to penalties pursuant to §6675.

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[1] Act of June 29, 1956, ch. 462, title 11, §§201-208, 211, 70 Stat. 387, 402.

[2] 26 U.S.C. §6420 and 26 U.S.C. §6427 contain identical language at §§6420(b) and 6427(i).

Congress, in the Excise Tax Reduction Act amended §§6420 and 6421 to provide that credits for fuel tax refunds would be made to taxpayers subject to income taxes. P.L. 89-44. Payment of a refund of the gasoline tax (as opposed to an income tax credit) is authorized if the ultimate purchaser is not subject to income tax. *Id.* 26 U.S.C. §6420(g), §6421(i) This class of purchasers includes the United States, the states, their political subdivisions, and their agencies or instrumentalities. Thus, Congress placed states and their subdivisions and their agencies on the same footing as the United States itself.[3]

The Indian Tribal Government Act provided Indian tribal governments would be treated as states. As codified in 26 U.S.C. §7871, where the transaction involves the exercise of a governmental function, an Indian tribal government is treated as a state

> for purposes of any exemption from, credit or refund of or payment with respect to, an excise tax imposed by (A) chapter 31 (relating to tax on special fuels), (B) chapter 32 (relating to manufacturers excise taxes). . . .

Most federal excise taxes were not applicable to sales for the use of Native American tribal governments; specifically excise taxes on liquid fuels did not apply to sales for the exclusive use of an Indian tribal government or subdivision. Senate Report 97-646 p.12-13. With regard to sales where tax was imposed on exempt articles, the credit and refund

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[3] The same language was included in 26 U.S.C. §6427 when the section was added by P.L. 91-258, sec 207(a) effective for years ended after June 30, 1970.

provisions of Subtitle F were to apply. *Id.* There was no reference to penalty provisions. Prior to the Tax Reform Act of 1986, by virtue of its state status a Native American tribe was permitted to file a claim for refund of manufacturers excise taxes including those on gasoline. 26 U.S.C. §6420, §6421, §6427, §7871(a)(2).

Effective April 1, 1998, Congress repealed all code provisions permitting tax exempt sales of gasoline beyond the wholesale level. *See*, Omnibus Budget Reconciliation Act of 1987, Public Law 100-203; H.Rep. 100-495 at 999-1000 (1987), reprinted in 1987-3 C.B. 193, 279-280; H.Rep. 391 (II) at 1594-1595, reprinted in 1987 USCCAN at 2313-1177. In order to effect that change Public Law 99-514 §1703(c) added Subsection (c) to §6421. It provides:

> Exempt purposes. If gasoline is sold to any person for any purpose described in paragraph (2), (3), (4) or (5) of Section 4221(a), the Secretary shall pay (without interest) to such person an amount equal to the product of the number of gallons of gasoline so sold multiplied by the rate at which the tax was imposed on such gasoline by Section 4081.

At the same time, Congress did not modify 26 U.S.C. §6675, 26 U.S.C. §6420(b), 26 U.S.C. §6421(d) or §6427(i).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari.

Dated this _____day of April, 2000.

/s/_____
Michael M. Billion
Myers, Peters, Hoffman & Billion
300 N. Dakota Ave., #510
Sioux Falls SD 57104
(605) 336-3700

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed November 29, 1999]

No. 99-1670

Flandreau Santee Sioux Tribe, *Appellant,* [sic]	)
v.	)
United States of America, *Appellee.* [sic]	)

Appeal from the United States District Court for the District of South Dakota

OPINION

Before BOWMAN, ROSS, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BOWMAN, Circuit Judge.

In 1988, the Flandreau Santee Sioux Tribe bought gasoline from a wholesaler and sold it to the public at a

convenience store. When the Tribe bought the gasoline, the price included a federal excise tax. The Tribe asked the IRS for a refund of $12,300, the total amount of excise taxes it paid that year. The IRS initially gave the Tribe a refund, but then, after an audit, determined that the Tribe was not entitled to the refund after all. Not only did the IRS ask for the $12,300 back, but it also sought $24,600 in penalties imposed upon the Tribe for filing an excessive refund claim.

The Tribe paid, but then filed the present suit challenging the penalties. The Tribe does not claim that it was entitled to a refund of the excise taxes; it only disputes the penalties. The District Court, on cross motions for summary judgment, held that the IRS could not collect the $24,600 in penalties because the relevant statute, 26 U.S.C. § 6675(a), does not apply to Native American tribes. The IRS appeals, and we reverse.

I.

A proper understanding of the statutory framework is critical to the resolution of this dispute. The federal government collects excise taxes on gasoline at the wholesale level; wholesalers pay the tax up front and then pass the cost on. See 26 U.S.C. §§ 4081-83[1] (contained in "Chapter 32 –

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[1] Throughout this opinion, we refer to the various statutes as they existed at the relevant times. Congress and the IRS have altered the rules governing the collection of gasoline excise taxes since 1988. See A. Terricone, Inc. v. United States, 4 F. Supp. 2d 323, 324-25 (S.D.N.Y. 1998) (explaining changes in statutes and regulations). The other statutes have not changed in a relevant way.

Manufacturers Excise Taxes"). Some sales of gasoline are exempt from the excise tax, including sales "to a State or local government for the exclusive use of a State or local government." Id. § 4221(a)(4). A Native American tribal government is considered a state "for purposes of any exemption from, credit or refund of, or payment with respect to, an excise tax imposed by . . . chapter 32," id. § 787 l(a)(2)(B), so long as the purchase of gasoline "involves the exercise of an essential governmental function of the Indian tribal government." Id. § 7871(b). Here, the Tribe's sale of the gasoline to the public indisputably did not involve the exercise of an essential governmental function. Thus, the Tribe was not exempt from the excise tax.

Instead of requiring wholesalers of gasoline to police the various exemptions to the excise tax, the federal government requires exempted persons to pay the tax as part of the purchase price of gasoline, and then to seek a refund directly from the government:

> If gasoline is sold to any person for any purpose described in paragraph . . . (4) . . . of section 4221(a), the Secretary shall pay (without interest) to such person an amount equal to the product of the number of gallons of gasoline so sold multiplied by the rate at which tax was imposed on such gasoline. . . .

Id. § 6421(c) (emphasis added).

A statutory penalty applies to persons seeking a refund greater than that to which they are entitled:

> In addition to any criminal penalty provided by law, if a claim is made under section . . . 6421 . . . for an excessive amount, unless it is shown that the claim for such excessive amount is due to reasonable cause, the person making such claim shall be liable to a penalty. . . .
>
> . . . For purposes of this section, the term "excessive amount" means in the case of any person the amount by which . . . the amount claimed under section . . . 6421 . . . exceeds . . . the amount allowable under such section for such period.

Id. § 6675(a), (b) (emphasis added).

II.

In this case, the District Court held that 26 U.S.C. § 6675 does not apply to Native American tribes because a tribe is not a "person" within the meaning of that statute. The District Court found that the statute contains no definition of "person" and turned to the Internal Revenue Code's fallback provision, 26 U.S.C. § 7701, which provides definitions of terms to be used "where not otherwise distinctly expressed or manifestly incompatible with the intent" of the particular statute in question. Id. § 7701(a); see also Autrey v. United States, 889 F.2d 973, 979 n.7 (11th Cir. 1989). "Person" is defined therein as follows: "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). The District Court determined that this

definition does not clearly include or exclude Native American tribes, and therefore interpreted the statute in favor of the Tribe. See Hagen v. Utah, 510 U.S. 399, 411 (1994) (stating that ambiguities in statutes should be resolved in favor of Native Americans); Gould v. Gould, 245 U.S. 151, 153 (1917) (stating that tax statutes are construed liberally against the government).

We review this question of statutory interpretation de novo. See Braswell v. City of El Dorado, Ark., 187 F.3d 954, 957 (8th Cir. 1999). Reading the statutory scheme as a whole, we conclude that it contains no ambiguity. The term "person," as used in 26 U.S.C.§ 6675, includes Native American tribes.

It is undisputed that a Native American tribe may receive a refund on excise taxes when its purchases are actually exempt. Congress expressly made it so with the Indian Tribal Government Tax Status Act of 1982. Pub. L. No. 97-473, § 202(a), 96 Stat. 2607 (codified as amended at 26 U.S.C. § 7871). Under the statutory scheme, a "person" may apply for a refund. 26 U.S.C. § 6421(c). We must, therefore, read the word "person" in § 6421(c) to include a Native American tribe, or otherwise the Indian Tribal Government Status Act's provisions relating to excise taxes would be rendered meaningless. The Tribe does not contest this fact, but argues that the term "person" in § 6675 means something different.

We reject this argument for three reasons. First, the text of § 6675 commands otherwise. Second, "person" should be interpreted consistently in interrelated parts of the

tax code. Third, an exclusion for Native American tribes is inconsistent with the statute's purpose.

The text of § 6675 declares that anyone who makes an excessive claim is within the definition of person for the purposes of that statute. The Tribe argues that, under § 6675, only "a person" is subject to a penalty, and that the Tribe is not "a person." This interpretation is inconsistent with the statute's use of the definite article "the" instead of the indefinite article "a": "[I]f a claim is made . . . for an excessive amount, . . . the person making such claim shall be liable to a penalty. . . ." 26 U.S.C. § 6675(a) (emphasis added). The statute's use of "the person" refers to someone specific – whoever made the excessive claim. See Webster's Third New International Dictionary 2368 (1981) ("The[:] used as a function word to indicate that a following noun or noun equivalent refers to someone or something previously mentioned or clearly understood from the context or the situation. . . ."); see also Black's Law Dictionary 1324 (5th ed. 1979) ("Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the'. [sic] The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object.") (quoting unidentified authority). Thus, § 6675 does not contemplate the existence of "non-persons" who make excessive claims.

In addition, the use of the term "person" in §§ 6421 and 6675 should be interpreted consistently. "It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Commissioner v. Keystone Consol. Indus., Inc., 508 U.S. 152, 159 (1993) (internal quotations and citations

omitted). We have recently used this rule to interpret the word "person" consistently in different sections of the False Claims Act. See United States ex rel. Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 875 (8th Cir. 1998). We are also mindful that, in particular, "the [Internal Revenue] Code must be given as great an internal symmetry and consistency as its words permit." Keystone Consol., 508 U.S. at 159 (internal quotations and citation omitted).

The history of the relevant statutory provisions supports this interpretation. The use of the word "person" in § 6675 originated on April 2, 1956, as part of a measure that provided excise tax refunds to farmers. See Act of April 2, 1956, Pub. L. No. 466, § 3, 70 Stat. 87, 90 (codified as amended at 26 U.S.C. § 6675). A few months later, Congress created § 6421, which gives excise tax refunds in other circumstances, and Congress simultaneously amended § 6675 to apply to excessive claims made under § 6421. See Highway Revenue Act of 1956, Pub. L. No. 627, 70 Stat. 387, 394-96 (codified as amended in scattered sections of 26 U.S.C.). Sections 6675 and 6421 thus are not two distant and unrelated parts of the tax law. While not created with the same Congressional vote, their origins and functions are closely intertwined. "The interrelationship and close proximity of these provisions of the statute present[] a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Commissioner v. Lundy, 516 U.S. 235, 250 (1996) (internal quotations and citation omitted).

Finally, this interpretation of § 6675 is more consistent with the statute's purpose and its placement in a broader

system designed for efficient tax collection. The § 6675 penalty is clearly designed to deter excessive claims, and that purpose applies just as well to Native American tribes as to others. Without such a deterrent, the IRS would have to expend more public resources on audits and perhaps criminal prosecutions. Congress's use of the word "person" in § 6675 certainly could not have been intended to create a system that would naturally tend to subject Native American tribes to more scrutiny than other claimants. We decline to interpret it to do so.

For the preceding reasons, we find that the term "person" in § 6675 includes Native American tribes. We need not reach the question of whether the statutory fallback definition of "person" contained in 26 U.S.C. § 7701 (a)(1) also includes Native American tribes. It is clear from §§ 6421(c), 6675, and 7871, read together, that the Tribe is a person for the purposes of § 6675. Even assuming, arguendo, that the definition of "person" in § 7701(a)(1) does not include Native American tribes, that definition would not apply to § 6675 because it would be "manifestly incompatible with the intent" of the relevant provisions. 26 U.S.C. § 7701(a).

III.

The penalty statute contains an exception for excessive claims made for "reasonable cause." 26 U.S.C. § 6675(a): see also Valley Ice & Fuel Co. v. United States, 30 F.3d 635, 640-41 (5th Cir. 1994). The Tribe's Amended Complaint raises "reasonable cause" as an alternative basis for holding the Tribe not liable for the penalty, but the District Court did not reach the Tribe's claim of entitlement to the benefit of the

"reasonable cause" exception. The District Court is directed to address the issue on remand.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest: /s/_____
CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed February 28, 2000]
[Dated November 29, 1999]

No. 99-1670DSF

Flandreau Santee Sioux Tribe, *Appellant,*	)
v.	)
United States of America, *Appellee.*	)

Appeal from the United States
District Court for the
District of South Dakota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

November 29, 1999

A true copy

ATTEST: /s/_____
CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED,
FEB 25 2000

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

[Filed October 2, 1998]

No. 97-4116

FLANDREAU SANTEE SIOUX TRIBE, *Plaintiff*,	)
v.	)
UNITED STATES OF AMERICA, *Defendant*.	)

MEMORANDUM OPINION AND ORDER

This is a suit brought by the Flandreau Santee Sioux Tribe for the recovery of a tax penalty collected by the Internal Revenue Service (IRS) under 26 U.S.C. § 6675. The Court has jurisdiction under 28 U.S.C. § 1346(a)(1). Pending before the Court are cross-motions for summary judgment. For the reasons stated below, the Court grants the Tribe's motion for summary judgment.

Prior to and continuing through all of 1988, the Flandreau Santee Sioux Tribe possessed the status of a federally recognized tribe organized pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-479. It is undisputed that the Tribe has an "Indian Tribal Government" as defined in 26 U.S.C. § 7701(a)(40).

During 1988, the Tribe operated the First American Mart, a convenience store, in Flandreau, South Dakota. The convenience store was open to the general public and sold gasoline to the public. On or about August 23, 1991, the Tribe filed an administrative claim for a refund of the federal gasoline excise taxes paid for each of the four quarters of 1988. The Tribe sought a refund of the-excise taxes paid on all gasoline purchased from its supplier during 1988. The IRS sent the Tribe a refund of the total federal gasoline excise taxes it paid in 1988.

Subsequently, the IRS conducted an audit and determined that the full refund was erroneous because the plaintiff sold gasoline purchased from its supplier to the general public and did not use that gasoline for "an essential governmental function of the Indian tribal government" as required by 26 U.S.C. § 7871(b). Only gasoline used for "an essential governmental function of the Indian tribal government" was exempt from the excise tax. The IRS determined the Tribe improperly claimed its 1988 refund and assessed the gasoline excise taxes for 1988, along with interest and a penalty under 26 U.S.C. § 6675. The penalty statute provides, in pertinent part:

> if a claim is made under section . . . 6427 (relating to fuels not used for taxable purposes)

> for an excessive amount, unless it is shown that the claim for such excessive amount is due to reasonable cause, the person making such claim shall be liable to a penalty in an amount equal to whichever of the following is the greater:
>
> (1) Two times the excessive amount; or
> (2) $10.

26 U.S.C. § 6675. Because the Tribe claimed and received a refund of $12,300.02, plus interest, the IRS assessed a penalty of $24,600.04, plus interest. The Tribe paid the gasoline excise tax for 1988 and certain interest assessed on the tax. On June 3, 1996, the Tribe paid the penalty and filed an administrative claim for a refund. On January 2, 1997, the IRS denied the Tribe's refund claim on the penalty assessed. The Tribe then brought this suit seeking refund of the penalty paid, plus statutory interest and attorney's fees. The IRS counterclaims for additional interest amounts it assessed on April 14, 1997, in the amount of $5,423.84 and on April 21, 1997, in the amount of $3,397.15, on the Tribe's 1988 gasoline excise tax liabilities, including the § 6675 penalty. The Tribe has not paid the additional $8,820.99 in assessed interest, plus interest accrued after the dates of assessment.

The Tribe moves for summary judgment on the ground that it is not a "person" for purposes of § 6675, and therefore, the penalty statute does not apply to it. The Tribe concedes that, for purposes of the gasoline excise tax, the Tribe is treated like a State and is subject to the payment of excise taxes on gasoline that is not used for "an essential governmental function of the Indian tribal government." 26

U.S.C. §§ 4081, 4221(a)(4), 7871(a)(2)(B) & (b) . The Tribe argues, however, that § 6675, the penalty statute, refers only to the "person" making the claim for refund, and the Tribe is not a "person" as defined in 26 U.S.C. § 7701(a) (1). That definitional statute provides, in pertinent part:

> (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--
> (1) Person. - The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.
> (2) Partnership and partner. - The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.
> (3) Corporation. - The term "corporation" includes associations, joint-stock companies, and insurance companies.

The Tribe argues that the term "person" does not include the sovereign, and statutes employing the phrase are ordinarily construed to exclude the sovereign. See Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979); Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1054

(9th Cir. 1985), rev'd on other grounds, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985). The Tribe argues that it is not a mere group or unit comprised of individuals, but that it has a specific legal identity as a governmental entity, it is a domestic nation, and it is a distinct political community that exercises powers of independence and self-government. The Tribe further contends that a definitional statute which declares what a term "means" excludes any meaning that is not stated, National Wildlife Fed. v. Gorsuch, 693 F.2d 156, 172 (D.C. 1982), while a definitional statute that uses the word "includes" denotes enlargement, not limitation. Exxon Corp. v. Lujan, 730 F.Supp. 1535, 1545 (D.Wyo. 1990), aff'd, 970 F.2d 757 (10th Cir. 1992). Section 6675 states that "person shall be construed to mean and include[,]" a phrase which is ambiguous, the Tribe argues, because it uses both restrictive and expansive terms. Because ambiguous statutory provisions are resolved in favor of the Indians, Hagen v. Utah, 510 U.S. 399, 411, 114 S.Ct. 958, 965, 127 L.Ed.2d 252 (1994), and because tax statutes are construed liberally against the government and in favor of the taxpayer, Gould v. Gould, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211 (1917); Security Bank Minnesota v. Commissioner Of Internal Revenue Serv., 994 F.2d 432, 441 (8th Cir. 1993), the Tribe argues that the penalty statute does not apply to it.

The government contends, on the other hand, that the Tribe's position is illogical and without merit because if the gasoline excise tax applies to the Tribe, then the penalty associated with the tax applies, too. The government reads together the definitions of "person," "partnership," and "corporation," as stated in § 7701(a)(1), (2), and (3), and argues that Congress has provided a lengthy, inclusive, and non-exhaustive list that should be held to include the Tribe

because the Tribe has not been expressly excluded from the definition, relying upon Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878, 881 (9th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); Lac Courte Oreilles Chippewa Indians v. United States, 845 F.2d 139 (7th Cir. 1988); Chemehuevi Indian Tribe, 757 F.2d at 1054; Gorsuch,. 693 F.2d at 172; Highway & City Freight Drivers, Dockmen and Helpers, Local Union No. 600 v. Gordon Transports, Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002 (1978); and Lujan, 730 F.Supp. at 1545.

The government also cites Cabazon Indian Casino v. Internal Revenue Service, 57 B.R. 398, 403 (B.A.P. 9th 1986), in which the Ninth Circuit Bankruptcy Appellate Panel affirmed the imposition of a tax penalty on the Tribe for failure to file tax returns and to pay FICA and FUTA excise taxes under 26 U.S.C. §§ 6601 and 6651. The Tribe argues that Cabazon Indian Casino is distinguishable becaues FICA and FUTA taxes are imposed on every employer based on wages paid in employment, and § 6651 imposes a penalty for failure to file a tax return as an additional tax. Moreover, in contrast to § 6675, the imposition of the failure to file penalty tax does not fall upon a "person," but on the act of failing to file.

The Court has carefully considered the statutes and cases cited, as well as the arguments made by the parties. Congress amended the Tax Code through passage of the Indian Tribal Government Tax Status Act of 1982 to extend the excise tax exemption to tribal governments and their subdivisions so that tribes would be treated like states which are entitled to excise tax exemption for all purchases used in

the exercise of an essential governmental function. 26 U.S.C. § 7871(a)(2)(B) & (b); Lac Courte Oreilles Bank of Lake Superior Chippewa Indians, 845 F.2d at 142-43. The Tribe is not precisely like a state in all respects, because "'the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress.'" Kurtz, 691 F.2d at 880 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980)). Nonetheless, Congress passed § 7871 to place Indian tribes on the same footing with states for purposes of claiming an exemption for the gasoline excise tax. Section 7701(10) provides that a "state" will be construed "to include the District of Columbia, where such construction is necessary to carry out provisions of this title." Thus, in § 7701 Congress defined the word "state" separately from the word "person." The parties have not cited any cases in which a court has upheld application of the penalty statute, § 6675, to a state, and the Court has not been able to locate such a case.

The Court concludes that the Tribe is not a "person" under § 6675, as that term is defined in § 7701(a)(1), (2), or (3). Section 7701 provides that the definition is to be used unless another definition of the term is "distinctly expressed" or the use of the § 7701 definition would be "manifestly incompatible" with the intent of Title 26. Bailey Vaught Robertson & Co. v. United States, 828 F.Supp. 442, 444 (N.D.Tex. 1993). Congress has expressly stated that "[t]he term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1) (emphasis added). The Court agrees with the Tribe that the statute is ambiguous because it uses both restrictive and inclusive language. The Court concludes that the definition of "person" is more

restrictive than it is inclusive. Moreover, even considering the definition of "partnership," the Court concludes that the Tribe cannot be characterized as a "group through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation[.]" Congress could have explicitly amended § 6675 and § 7701 when it passed § 7871 to eliminate any doubt about whether Indian tribes are subject to the penalty provision, but it did not do so. The legislative history does not shed any light upon whether Congress intended for an Indian tribe to be defined as a "person," subject to the penalty provision. Because ambiguous statutory provisions are resolved in favor of the Indians, Hagen, 510 U.S. at 411, 114 S.Ct. at 965, and because tax statutes are construed liberally against the government and in favor of the taxpayer, Gould, 245 U.S. at 153, 38 S.Ct. 53, 53; Security Bank Minnesota, 994 F.2d at 441, the Court holds the penalty statute does not apply to the Tribe.

In light of the Court's ruling on the Tribe's motion for summary judgment, the Court need not rule upon the government's motion for summary judgment on the issue of whether the Tribe fails to establish "reasonable cause" to avoid the penalty under § 6675 on the ground that the Tribe failed to follow the advice of its attorney in preparing its claim for an excise tax refund. In any event, the Court would hold that the question of reliance upon the advice of counsel is present as an element in this case, but factual disputes appear in the record as to what the attorney told tribal officials and what tribal officials understood. Cf. United States v. Boyle, 469 U.S. 241, 249 n.8, 105 S.Ct. 687, 692 n.8, 83 L.Ed.2d 622 (1985); Valley Ice & Fuel Co. v. United States,

30 F.3d 635, 640 (5th Cir. 1994). Therefore, taking the facts in the light most favorable to the Tribe, the Court would not grant summary judgment for the government on this ground.

Because the Court rules in favor of the Tribe holding that the penalty statute does not apply to it, any portion of the government's counterclaim that is dependent upon application of the penalty statute is dismissed. Other issues remain for resolution before final Judgment is entered, such as whether the Tribe is entitled to statutory interest in addition to refund of the penalty paid and whether the Tribe is entitled to attorney's fees. The government must also inform the Court whether any portion of its counterclaim for additional interest based upon the Tribe's 1988 gasoline excise tax liability remains to be decided. The Court will request supplemental briefing on these issues. Accordingly,

IT IS ORDERED:

(1) that the Tribe's motion for summary judgment is granted. (Doc. 14.)

(2) that the government's motion for summary judgment is denied. (Doc. 29.)

(3) that the plaintiff Flandreau Santee Sioux Tribe will file a supplemental brief addressing the remaining issues as stated in this Memorandum Opinion and Order no later than Friday, October 16, 1998.

(4) that the government will file a responsive brief as to plaintiff's issues and address

whether any portion of its counterclaim remains for decision, no later than Friday, October 30, 1998.

(5) that the plaintiff may file a reply brief, if any, no later than Friday, November 6, 1998.

(6) that the bench trial scheduled for Friday, October 2, 1998, at 9:00 a.m., is cancelled.

Dated this 1st day of October, 1998.

BY THE COURT:

/s/_____
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

By: /s/_____
(SEAL) DEPUTY

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

[Filed December 15, 1998]

No. 97-4116

FLANDREAU SANTEE SIOUX TRIBE,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

In accordance with this Court's October 1, 1998 Memorandum Opinion and Order and the Stipulation Of Partial Dismissal filed by counsel for the parties on December 1, 1998,

IT IS ORDERED, ADJUDGED, and DECREED:

(1) that Judgment is entered in favor of the Flandreau Santee Sioux Tribe and against the United States of America on the Tribe's claim against the

United States for recovery of a tax penalty in the amount of $24,600.04 collected by the Internal Revenue Service (IRS) under 26 U.S.C. § 6675.

(2) that Judgment is entered in favor of the Flandreau Santee Sioux Tribe and against the United States of America on that portion of the counterclaim filed by the United States seeking statutory interest on the § 6675 penalty.

(3) that the portion of the counterclaim filed by the United States seeking outstanding interest on the federal gasoline excise tax owed by the Flandreau Santee Sioux Tribe for 1988 is dismissed with prejudice.

(4) that each party will bear its own costs, including attorney's fees.

Dated this 15th day of December, 1998.

BY THE COURT:

/s/_____
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: /s/_____
(SEAL) DEPUTY

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed February 9, 2000]

No. 99-1670SDSF

Flandreau Santee Sioux Tribe, *Appellee,*	)
v.	)
United States of America, *Appellant.*	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 9, 2000

Order Entered at the Direction of the Court:

/s/_____
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

26 U.S.C. § 6421

§ 6421. GASOLINE USED FOR CERTAIN NONHIGHWAY PURPOSES, USED BY LOCAL TRANSIT SYSTEMS, OR SOLD FOR CERTAIN EXEMPT PURPOSES.

* * * *

(c) Exempt Purposes.– If gasoline is sold to any person for any purpose described in paragraph (2), (3), (4), or (5) of section 4221(a), the Secretary shall pay (without interest) to such person an amount equal to the product of the number of gallons of gasoline so used multiplied by the rate at which tax was imposed on such gasoline by section 4081.

(d) Time for Filing Claims; Period Covered.--

(1) In general.– Except as provided in paragraph (2), not more than one claim may be filed under subsection (a), not more than one claim may be filed under subsection (b), and not more than one claim may be filed under subsection (c) by any person with respect to gasoline used during his taxable year; and no such claim shall be allowed under this paragraph with respect to gasoline used during any taxable year unless filed by such person not later than the time prescribed by law for filing a claim for credit or refund of overpayment of income tax for such taxable year. For purposes of this subsection, a

person's taxable year shall be his taxable year for purposes of subtitle A.

(2) Exception. - If $1,000 or more is payable under this section to any person with respect to gasoline used during any of the first three quarters of his taxable year, a claim may be filed under this section by such person with respect to gasoline used during such quarter. No claim filed under this paragraph shall be allowed unless filed on or before the last day of the first quarter following the quarter for which the claim is filed.

* * * *

(g) Applicable Laws.--

(1) In general. - All provisions of law, including penalties, applicable in respect of the tax imposed by section 4081 shall, insofar as applicable and not inconsistent with this section, apply in respect of the payments provided for in this section to the same extent as if such payments constituted refunds of overpayments of the tax so imposed.

* * * *

(j) Income Tax Credit in Lieu of Payment.--

(1) Persons not subject to income tax.-- Payment shall be made under subsections (a) and (b) only to--

(A) the United States or an agency or instrumentality thereof, a State, a political subdivision of a State, or an agency or instrumentality of one or more States or political subdivisions, or

(B) an organization exempt from tax under section 501(a) (other than an organization required to make return of the tax imposed under subtitle A for its taxable year).

(2) Exception.– Paragraph (A) shall not apply to a payment of a claim filed under subsection (d)(2).

* * * *

(k) Cross References.--

(1) For civil penalty for excessive claims under this section, see section 6675.

* * * *

(3) For treatment of an Indian tribal government as a State (and a subdivision of an Indian tribal government as a political subdivision of a State), see section 7871.

26 U.S.C. § 6675

§ 6675. EXCESSIVE CLAIMS WITH RESPECT TO THE USE OF CERTAIN FUELS.

(a) Civil Penalty. – In addition to any criminal penalty provided by law, if a claim is made under section 6420 (relating to gasoline used on farms), 6421 (relating to gasoline used for certain nonhighway purposes or by local transit systems), or 6427 (relating to fuels not used for taxable purposes) for an excessive amount, unless it is shown that the claim for an excessive amount is due to reasonable cause, the person making such claim shall be liable to a penalty in an amount equal to whichever of the following is the greater:

(1) two times the excessive amount; or

(2) $10.

(b) Excessive Amount Defined. – For purposes of this section, the term "excessive amount" means in the case of any person the amount by which--

(1) the amount claimed under section 6420, 6421, or 6427, as the case may be, for any period, exceeds

(2) the amount allowable under such section for such period.

(c) Assessment and Collection of Penalty.--

For assessment and collection of penalty provided by subsection (a), see section 6206.

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26 U.S.C. § 7701

§ 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof–

(1) **Person.** – The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) **Partnership and partner**. – The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) **Corporation.** – The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * *

(10) **State.**--The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

* * * *

(40) Indian tribal government.--The terms "Indian tribal government" means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.

26 U.S.C. § 7871

§ 7871. Indian Tribal Governments Treated as States for Certain Purposes.

(a) General rule:

An Indian tribal government shall be treated as a State--

* * * *

(2) subject to subsection (b), for purposes of any exemption from, credit or refund of, or payment with respect to, an excise tax imposed by –

(A) chapter 31 (relating to tax on special fuels),

(B) chapter 32 (relating to manufacturers excise taxes),

(C) subchapter B of chapter 33 (relating to communications excise tax), or

(D) subchapter D of chapter 36 (relating to tax on use of certain highway vehicles);

* * * *